93-316

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

LARRY D. BARNETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Larry D. Barnette, pro se
1500 Holly Avenue
Merritt Island, FL 32952
(407) 453-3545

For Petitioner

August 11, 1993

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the clear and unambiguous language of the **NATO/SOFA TREATY** which grants a receiving state (Germany) primary exclusive jurisdiction to try members of the "civilian component" for crimes committed in the receiving state, can be ignored so as to vest the District Court with jurisdiction in violation of the Treaty without first obtaining the waiver of jurisdiction required by the Treaty?

II.

Whether the Court of Appeals can usurp legislative and executive power by filling a judicial "gap" created by Reid v. Covert when Congress has failed to fill such gap.

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iii

Opinion Below vii

Jurisdiction vii

Statement of the Case 1

Conclusion 20

Appendix A:

Opinion and Judgment on the Court of Appeals dated May 17, 1993 . A-1

TABLE OF AUTHORITIES

CASES

Grisham v. Hagen,
361 U.S. 278 (1960) 11,12,26

Hanford v. Davies,
163 U.S. 273 (1896). 15

Kinsella v. U. S. ex rel. Singleton,
361 U.S. 234 (1960) 11,26

Lockerty v. Phillips,
319 U.S. 182 (1943) 14

M'Cullock v. Maryland,
4 Wheat 316, 4 L.Ed. 579 28

McElroy v. U. S. ex rel. Guagliardo,
361 U.S. 281 (1960) 11,26

Metcalf v. Watertown,
128 U.S. 586 (1888) 15

Palmore v. United States,
411 U.S. 389 (1973) 14

Reid v. Covert,
354 U.S. 1 (1957) . . 8,11,16,25,26,27

Toth v. Quarles,
350 U.S. 11 (1955) 28

Weinberger v. Rossi,
456 U.S. 25 (1982) 19

Wilson v. Gerard,
354 U.S. 524 (1957) 11,26

Bell v. Clark,
437 F.2d 200 (4th Cir. 1971) . . 19,25

Drew v. United States,
331 F.2d 85 (D.C. Cir. 1964) 31

Gerritsen v. de la Madrid Hurtado,
819 F.2d 1511 (9th Cir.) 15

Gmo. Niehaus & Co. v. U. S.,
373 F.2d 944 (Ct.Cl. 1967) 15

Matter of Burt,
737 F.2d 1477 (7th Cir. 1984) . . . 17

Plaster v. United States,
720 F.2d 340 (4th Cir. 1983) 13

United States v. Anderson,
509 F.2d 312 (D.C. Cir. 1974) . . . 31

United States v. Barnette,
800 F.2d 1558 (11th Cir. 1986),
cert. denied, 480 U.S. 934 (1987) . . 1

United States v. Colon,
559 F.2d 1380 (5th Cir. 1977) . . . 30

United States v. Heller,
785 F.2d 1528 (11th Cir. 1986) . . 31

United States v. Perkins,
748 F.2d 1519 (11th Cir. 1984) . . 31

Waters v. United States,
316 F.2d 301 (5th Cir. 1963) . . . 15

Williams v. Rogers,
449 F.2d 513 (8th Cir. 1971),
cert. denied, 409 U.S. 926 (1972) 13,14

Bell v. Clark, 308 F.Supp. 384
(E.D. Va. 1970), affirmed,
437 F.2d 200 (4th Cir. 1971) . . . 12

Hannevig v. United States,
84 F. Supp. 743,
114 Ct.Cl. 410 (1949) 15

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

LARRY D. BARNETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FOR THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, Larry D. Barnette, pro se, files this petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above entitled proceeding on May 17, 1993.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on May 17, 1993 and is attached hereto as Appendix A.

JURISDICTION

Petitioner seeks review of an order and opinion dated May 17, 1993, of the United States Court of Appeals for the Eleventh Circuit, see infra Appendix A. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUES INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. Article II, Section 2, paragraph 2

U.S. Const. Article III, Section 1

U.S. Const. Article VI, paragraph 2

STATUTES

18 U.S.C. section 3231

TREATIES

Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces ("NATO-SOFA TREATY'), 4 U.S.T. page 1794, T.I.A.S. No. 2846

Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces ("Supplementary Agreement"), 14 U.S.T. page 531

STATEMENT OF THE CASE

On August 30, 1983, Larry Barnette ("Barnette") and others were indicted in a 25 count indictment. (R.1-1). After a three month trial before Judge Susan H. Black and a jury, Barnette was convicted on 17 counts. (R.11-520).[1] The conviction was affirmed, except as to a restitution order for one count, by the United States Court of Appeals for the Eleventh Circuit. See United States v. Barnette, 800 F.2d 1558 (11th Cir. 1986), cert. denied, 480 U.S. 934 (1987). (R.17-765). Barnette has served 39 months of incarceration of a 5 year sentence and is presently on probation. (R.20-955).

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[1]Judge Black has since recused herself and, pursuant to an order filed December 12, 1987, this case has been transferred to the Hon. John H. Moore, II. (R.19-830).

On March 3, 1988, Barnette filed a motion under 28 U.S.C. section 2255 to vacate his conviction. The basis for Barnette's claim for relief is the lack of jurisdiction by the United States District Court to try him for crimes alleged in the indictment. Barnette's claim is based on the following two treaties: "Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces", 4 U.S.T. page 1794, T.I.A.S. No. 2846 (hereinafter referred to as the "NATO-SOFA Treaty") and the "Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces", 14 U.S.T. page 531 (hereinafter referred to as the "Supplementary Agreement") and on the wording of the indictment itself.

The indictment centered around a German laundry and dry cleaning contract

("German laundry contract") between the Army and JETS Waescherei GmbH, a German company of which Barnette was the President and General Manager (R.10-673-143). The contract involved the providing of laundry and dry cleaning services to all of the NATO Forces in the Federal Republic of Germany ("West Germany"). (R.67-910-141 and R.67-910-166).

The initial terms of the German laundry contract required the contractor to operate and manage seven laundry and dry cleaning plants, numerous troop collection/pick-up points, all within the Federal Republic of Germany. (R.67-910-140). Under the terms of the contract, the initial accounting records were maintained by the contractor in the Federal Republic of Germany. The U. S. Army's Finance Offices in the Federal Republic of Germany were responsible,

under the contract, for invoicing each member country of NATO the full price charged by the contractor as stated in each individual "cross-serving agreement", and as authorized by 10 U.S.C. sections 2342, 2343, and 2344(b)(1)(A). (R.67-910-141).

All of the counts of the indictment centered on this German laundry contract, which was performed by a German corporation in Germany and paid for in German currency. Indeed, the Indictment actually charged that Barnette committed counts seven, eight and twelve "at Frankfurt, Federal Republic of Germany, outside the jurisdiction of any federal-judicial district." R.1-1. The Indictment further charged that Barnette committed counts thirteen and fourteen partially in Frankfurt and that he committed counts two, three, four, five,

si[illegible], fifteen and twenty-five in "[illegible]cksonville, Florida and elsewhere." "Elsewhere" was Frankfurt, Federal Republic of Germany.[2]

The NATO-SOFA Treaty and the Supplementary Agreement provide that when a member of the "civilian component" of the American Armed Forces is alleged to have committed a crime in the Federal Republic of Germany (hereinafter "the Federal Republic" or "Germany") which is punishable under the laws of the Federal Republic, the Federal Republic has primary exclusive jurisdiction to try the offender. In such circumstances, until the United States requests and Germany grants a waiver of jurisdiction, the United States is without jurisdiction to

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[2]Barnette was acquitted of counts 9, 13, 14, 19, 22, 23, and 24. Count 16 pertained to another defendant.

try the offender.

In 1977, as authorized and required by the NATO-SOFA Treaty, Barnette was designated by the United States Army in Germany as a member of the civilian component. He was a civilian employee working for a U. S. government contractor washing and dry cleaning the clothes for the NATO forces in Germany. His passport was stamped "Civilian Component." Each year the U. S. Army issued Barnette a personal identity card declaring him a "technical expert" under the terms of the NATO-SOFA Treaty and Article 73 of the Supplementary Agreement. A technical expert is considered a member of the "civilian component" by the Treaty. Barnette held this status until March 31, 1981 when the contract's term ended. On August 30, 1983, the Indictment giving rise to this case was handed down.

In his Section 2255 motion, Barnette asserts he was a member of the "civilian component"; the crimes he was accused of were committed in and punishable under the laws of Germany, and no waiver of Germany's jurisdiction was ever requested or granted. Accordingly, the United States District Court lacked jurisdiction to try the case, and the judgment of conviction should be null and void.

The matter was referred to the Magistrate for a Report and Recommendation. On December 4, 1989, the Magistrate heard and rejected the United States' argument that this was an issue of in personam, as opposed to subject-matter, jurisdiction, and thus, Barnette had waived his right to object because he had not raised the issue prior to his criminal trial. R.67-910.13. The Magistrate specifically found that Barnette had not

waived his objection to the district court's in personam jurisdiction over him. R.67-910.16. On December 29, 1989, after an evidentiary hearing, the Magistrate issued his Report and Recommendation. The Magistrate concluded that Barnette was not a member of the civilian component for purposes of the criminal jurisdiction provision, Article VII of the NATO-SOFA Treaty. Alternatively, even if Barnette was a member of the civilian component, "he would not be subject to the criminal jurisdictional frame work outlined in Article VII of the NATO-SOFA in light of Reid v. Covert, 354 U.S. 1 (1957), and its progeny." The District Judge adopted the Magistrate's Report and Recommendation and denied Barnette's motion.

Barnette appealed to the United States Court of Appeals for the Eleventh Circuit. That Court affirmed, stating, in

relevant part: "The court obviously had subject matter jurisdiction because the indictment charged the violation of criminal statutes of the United States. See 18 U.S.C. Section 3231. . . . . Petitioner waived his claim that the court lacked jurisdiction over his person by not presenting the claim to the district court prior to trial. . . . Petitioner's argument that various treaties, and agreements implementing them, entered into by the United States somehow ousted the district court of its jurisdiction to try the offenses charged in petitioner's indictment is frivolous on its face and accordingly requires no discussion. . . ."

ARGUMENT

I.

THE DECISION OF THE ELEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

This case raises the stark issue of whether the United States District Courts can expand their own jurisdiction to cover crimes committed in foreign lands by a civilian component of the United States Army, in the absence of any empowering legislation and in the presence of treaties and case law to the contrary. The United States Court of Appeals for the Eleventh Circuit (hereafter, the "Eleventh Circuit") assumption of jurisdiction without any analysis is so far outside the accepted and usual course of judicial proceedings, and so in conflict with the decisions of other Circuits and of this

Court as to call for an exercise of this Court's power of supervision.

II.

THERE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THE SUPREME COURT.

Moreover, to the extent that this case involves a member of the civilian component of the Armed Forces, that is, an independent contractor, as opposed to a civilian employee, a dependent, a serviceman or a discharged serviceman, it raises an important question of federal law which has not been, but should be, decided by this Court. See e.g. Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222 (1957); Wilson v. Gerard, 354 U.S. 524, 77 S.Ct. 1409 (1957); Grisham v. Hagan, 361 U.S. 278, 80 S.Ct. 310 (1960); McElroy v. U.S. ex rel Guagliardo. Wilson v. Boklender. Kinsella v. U.S. ex rel Singleton.

Grisham v. Hagan. concurring and dissenting opinions. 361 U.S. 234, 80 S.Ct. 311 (1960).

III.

THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The Eleventh Circuit's reliance on 18 U.S.C. Section 3231 was misplaced. That statute simply states, "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. . . ." First, it is well-settled that crimes committed outside the United States, as the Indictment alleged here, are not "offenses against the United States" and thus, cannot be tried in our district courts. Bell v. Clark, 308 F.Supp. 384, 388 (E.D.Va. 1970). "American courts generally do not have jurisdiction over

crimes committed outside the United States. Thus, . . . an American who commits a crime in Germany and returns to America cannot be tried in American courts -- he must be extradited to Germany if he is to stand trial for his crime." Plaster v. United States, 720 F.2d 340, 347 (4th Cir. 1983).

"The principles that the Federal courts are courts of limited jurisdiction, possessing only the power that the Congress expressly has conferred upon them by statute...; that parties cannot waive lack of subject matter jurisdiction whether by express consent or by conduct...; and that where jurisdiction does not exist the court, whether trial or appellate, shall dismiss the action sua sponte..., are all well established and, of course, have general application here." Williams v. Rogers, 449 F.2d 513 (8th Cir.

1971). See also Lockerty v. Phillips, 319 U.S. 182 (1943) (The federal courts derive their jurisdiction solely from Congress and Congress' authority is granted directly by Art. III, Section 1 of the U.S. Constitution).

Even if 18 U.S.C. Section 3231 were sufficient to vest the district court with jurisdiction over crimes committed in Germany, which it is not, it would still not avail the government in this case. Jurisdiction of the federal courts is limited not only by the provisions of Article III of the Constitution but also by Treaties and Acts of Congress. Palmore v. United States, 411 U.S. 389, 401 (1973); Lockerty v. Phillips, 319 U.S. at 197; Williams v. Rogers, 449 F.2d 513, 517-18 (8th Cir. 1971), cert. denied, 409 U.S. 926 (1972).

Other Circuits held specifically that

a treaty can limit the court's jurisdiction. See, Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511, 1519 (9th Circuit), Gmo. Niehaus & Co. v. United States, 373 F.2d 944, 957 (Ct.Cl. 1967) (per curiam); Hannevig v. United States, 84 F. Supp. 743, 114 Ct.Cl. 410 (1949).

Moreover, a federal court has not only the power, but the duty on its own motion, to determine if a case is one arising under the United States Constitution, treaties, or laws. See, e.g., Metcalf v. Watertown, 128 U.S. 586 (1888). There is a presumption against federal district court jurisdiction. See, e.g., Hanford v. Davies, 163 U.S. 273 (1896); Waters v. United States, 316 F.2d 301 (5th Cir. 1963).

IV.

IF THE DECISION OF THE ELEVENTH CIRCUIT REMAINS INTACT, IT WOULD ALLOW DISTRICT COURT JURISDICTION OVER CRIMES COMMITTED

IN THE RECEIVING STATE (GERMANY) IN VIOLATION OF THE PROVISIONS OF THE NATO/SOFA TREATY.

18 U.S.C. Section 3231 was enacted in 1948. The NATO-SOFA Treaty and Supplemental Agreement were ratified later, and thus superseded it. It is well-settled that under "the constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.....[I]f the laws are inconsistent, the one last in date will control the other...." Reid v. Covert, supra at f.n. 34, quoting Whitney V. Robertson, 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed 386. There is no question but that the offenses listed in the indictment as having been committed in Germany were offenses under German law.

All experts so testified before the Magistrate in the District Court. It is, of course, taken for granted that "the jurisdiction of the territorial sovereign over offenses committed within its borders is exclusive," Matter of Burt, 737 F.2d 1477, 1479 (7th Cir. 1984), unless an Agreement exists which permits another nation to exercise jurisdiction in limited circumstances. Here, the NATO-SOFA Treaty and Supplementing Agreement does exist but the United States failed to take advantage of it and thus its limited circumstances are not available to give the United States jurisdiction to try Barnette.

The NATO-SOFA and SOFA/SA Treaties clearly establish the Federal Republic of Germany had primary jurisdiction until and unless this jurisdiction was waived. No

such waiver was ever requested or granted.[3]

Section 2, paragraph 2 of Article II of the Constitution of the United States provides as follows:

> He (the President) shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present

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[3]On June 19, 1951, the United States of America among others signed the "Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces" (NATO-SOFA Agreement"). The NATO-SOFA Agreement is located at 4 U.S.T. (U.S. Treaties and Other International Agreements), page 1749. The NATO-SOFA Treaty was subsequently ratified by the U.S. Senate on July 15, 1953, ratified by the President on July 24, 1953, entered into force on August 23, 1953. (A copy of the Treaty is attached as Document No. A in the Record Excerpts.)

The Supplementary Agreement (sometimes referred to as "SOFA/SA") which supplemented the NATO-SOFA Agreement is located at 14 U.S.T. page 563. The SOFA/SA admitted the Federal Republic of Germany into NATO, and Article 1 of the SOFA/SA, supplements the provisions of the NATO-SOFA Agreement. (See Document No. B in the Record Excerpts.)

concur; . . .

The NATO-SOFA Agreement is such a treaty as contemplated by that provision of the Constitution. See note 14 of Weinberger v. Rossi, 456 U.S. 25, 102 S.Ct. 1510, 1517, 71 L.Ed.2d 715 (1982). Paragraph 2 of Article VI of the Constitution provides as follows:

> This Constitution, and the Laws of the United States which shall be in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Therefore, the NATO-SOFA Agreement is part and parcel of the "supreme Law of the Land." The provisions of the NATO-SOFA Agreement are given supremacy by the Constitution and are compulsory upon all courts of the United States. Bell v. Clark, 437 F.2d 200, 203 (4th Cir. 1971);

R.67-910-30.

Article VII of the NATO-SOFA Treaty (4 U.S.T. at page 1798) provides rules for determining which country would exercise jurisdiction over servicemen, civilian component, and their dependents, with respect to offenses committed within the territory of the receiving State (Germany). (R.67-910-31).

Paragraph 1.(b) of Article VII provides as follows:

> the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.

Paragraph 3 of Article VII provides as follows:

> In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
> (a) The military authorities of

> the sending States shall have the primary right to exercise jurisdiction over a member of a force or a civilian component in relation to (i) Offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent; (ii) offenses arising out of any act or omissions done in the performance of official duty.
> (b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.
> (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

(emphasis added)

Article 19 of the Supplementary Agreement (14 U.S.T., page 552) supplements the above provisions of the

NATO-SOFA Treaty. Paragraphs 1 and 2 of Article 19 provides:

> 1. At the request of a sending State, the Federal Republic shall, within the framework of sub-paragraph (c) of paragraph 3 of the Article VII of the NATO Status of Forces Agreement waive in favor of that State the primary right granted to the German authorities under sub-paragraph (b) of paragraph 3 of that Article in cases of concurrent jurisdiction, in accordance with paragraphs 2, 3, 4 and 7 of this Article.
>
> 2. Subject to any particular arrangements which may be made under paragraph 7 of this Article, the military authorities of the sending States shall notify the competent German authorities of individual cases falling under the waiver provided in paragraph 1.

The heart of the provisions in Article VII of the NATO-SOFA Treaty is that the Federal Republic of Germany has exclusive jurisdiction, and/or, primary right to exercise jurisdiction over the members of a force or civilian component.

This exclusive jurisdiction applies to offenses committed within the territory of the Federal Republic of Germany, which jurisdiction and primary right to exercise jurisdiction is exclusive until the Federal Republic of Germany receives a formal request to waive, or the Federal Republic of Germany notifies the authorities of the United States it has decided not to exercise jurisdiction pursuant to Article VII, paragraph 3(c), and does give the waiver of jurisdiction in favor of the United States (sending State).

The United States Government failed to formally request the waiver required under the NATO-SOFA Agreement, Article VII, paragraph 3(c) and the Federal Republic of Germany has not notified the authorities of the United States that it decided not to exercise its primary right.

Therefore, the Federal Republic of Germany has not relinquished its jurisdiction as provided for in said Article VII, paragraph 3(c) (4 U.S.T. at page 1800). Therefore, the United States District Court is and was without jurisdiction, and hence, the indictment, conviction, and sentence are null and void for which reason they should be vacated and set aside.

The Magistrate's conclusion that Barnette was not a member of the civilian component for purposes of the criminal jurisdiction provisions of the Treaty and Supplementing Agreement, even if correct, which it is not, would not result in giving the District Court jurisdiction over Barnette. To the contrary, it would give the United States no peg at all upon which to stake its jurisdictional claim over Barnette and would leave him solely

in the exclusive jurisdiction of Germany. Reid v. Covert, supra; Bell v. Clark, supra. The United States did not bargain for provisions allowing it to exercise criminal jurisdiction over persons who are not members of the civilian component or dependents.

V.

IF THE DECISION OF THE ELEVENTH CIRCUIT REMAINS INTACT, IT WOULD ALLOW THE LEGISLATIVE AND EXECUTIVE POWER TO BE USURPED BY THE JUDICIARY IN FILLING THE JUDICIAL GAP CREATED BY REID V. COVERT.

Congress has made no provision for the trial of civilian United States citizens who commit crimes in foreign lands other than to have them court-martialed by the Armed Forces stationed in the land where the crime was committed if they are members of the civilian component or dependents or turned over to that land for trial. This Court has held that civilians cannot be court-martialed.

Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222 (1957); Wilson v. Gerard, 354 U.S. 524, Section 77 S.Ct. 1409 (1957); Grisham v. Hagan, 361 U.S. 278, 80 S.Ct. 310 (1960); McElroy v. U.S. ex rel Guagliardo. Wilson v. Boklender. Kinsella v. U.S. ex rel Singleton. Grisham v. Hagan. concurring and dissenting opinions. 361 U.S. 234, 80 S.Ct. 311 (1960).[4] That leaves no alternative, until Congress provides otherwise, but to leave the jurisdiction in the foreign land. Reid v. Covert, supra.

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[4]"Congress once went to the extreme of subjecting persons who made contracts with the military to court-martial jurisdiction with respect to frauds related to such contracts.[39] In the only judicial test a Circuit Court held that the legislation was patently unconstitutional. Ex Parte Henderson, 11 Fed. Cas. page 1067, No. 6,349." Reid v. Covert, supra, at p. 20 and 1232. F.N.39 and 12, Stat. 696. . . . . The legislation was subsequently repealed. Rv. Stat. (1878 ed.) Sections 1342, 5596. Id.

As Justice Frankfurter pointed out in Reid v. Covert, supra, Congress had several alternatives for filling what amounts to a jurisdictional gap. Although on several occasions legislation to fill this jurisdictional gap was introduced in Congress, none of the bills ever emerged from committee.[5] As a result, Congress has failed to avail itself (or the federal courts) with any alternatives to fill this jurisdictional gap. The Eleventh Circuit's attempt to fill this jurisdictional gap is an improper usurpation of legislative and executive power. It passes the line which

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[5]From 1956-1970, several bills were introduced in Congress to close this "jurisdictional gap" but no bill emerged from committee. See, e.g., S.3189, 91st Cong., 1st Sess. (1969); S.2791 84th Cong., 2d Sess. (1956); S.761 89th Cong., 1st Sess. (1965).

circumscribes the judicial department to tread on legislative ground. M'Culloch v. Maryland, 4 Wheat 316, 4 L.Ed. 579. Congress has elected not to fill this judicial gap. It is not for courts to question Congress' wisdom in this regard. Toth v. Quarles, 350 U.S. 11, 28 (1955).

Although the government in its zeal to punish Barnette has acted as if this case was a capital case -- it is not. (See, e.g., R.20-955). Judge Moore characterized the government's zeal to punish as persecution rather than prosecution.[6] The government has taken

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[6]In Case No. 85-754-Civ-J-16, Judge Moore stated on June 27, 1990:

> "What we're talking about is persecution and not prosecution, Mr. Jones (Department of Justice Counsel), in my opinion. I think it's about time the Government got off the back of Mr. Barnette and let him live a human being's life, frankly."

over 16 different actions against Barnette in addition to the imprisonment and restitution of $7,000,000.[7]

Even though some of the counts pertain to offenses that allegedly occurred in the United States, the nexus of all of the charges resulted from the German laundry contract. The German laundry contract is the source of each and every allegation made in the indictment. This was clearly the position taken by the United States during the trial of this Defendant. Assistant United States Attorney, Terry Zitek, in making his opening remarks to the jury in this case on April 17, 1984 said:

Id. Page 9 of Transcript, Document No. F in the Record Excerpts.

[7]See pages 10, 11 and 12 of the Motion To Clarify Termination Of Probation, Or Alternatively To Terminate Probation. (Attached in the Record Excerpts as Document No. G.)

> As you listen to the evidence, most if not all, of it will involve one of those three aspects, fraud on the Army on the German laundry contract; fraud on the Internal Revenue Service in connecting with hiding the German laundry contract; and the fraud on the SBA by hiding the German laundry contract and hiding the existence of other business.

Id. Trial Transcript, R.11-673-143. Therefore, the German laundry contract was the overriding and dominant force for each and every count in the indictment. As the District Court clearly did not have jurisdiction over Barnette in counts 7, 8, and 12, as conceded in the indictment, the entire conviction must be reversed. It is impossible to determine the extent by which the jurors would have been influenced by the evidence adduced by the government at the trial on these counts. In United States v. Colon, 559 F.2d 1380, 1386 (5th Cir. 1977), the Court said:

> Because it is now impossible to determine the extent to which the challenged evidence may have influenced the jurors' minds, Colon must be granted a new trial, notwithstanding the presence of substantial admissible evidence to support the verdict. Leahy v. United States, 272 F.2d 487 (9th Cir. 1959), cert. denied, Reversed and remanded for a new trial.

When evidence of other crimes is offered, courts will presume prejudice will occur. Drew v. United States, 331 F.2d 85, 89-90 (D.C. Cir. 1964). Accord, United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974); United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984); United States v. Heller, 785 F.2d 1524, 1528 (11th Cir. 1986).

Lastly, the 11th Circuit erred in holding that Barnette had waived his objection to the Courts in personam jurisdiction over him because the objection here is to subject-matter

jurisdiction, which it is never too late to raise, and because even if the objection were to in personam jurisdiction, the Magistrate's specific finding that Barnette had not waived same was not challenged and was not appealed, and thus, could not be reviewed nor disturbed on appeal.

Since the District Court clearly lacked subject-matter jurisdiction over the offenses alleged in the indictment to have taken place in Germany, and since it is impossible to know what influence the evidence as to these counts may have had on the jury, the entire conviction must be reversed as null and void.

Larry D. Barnette

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August 11, 1993

"CORRECTED' [DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-3326

D.C. Dockets Nos. 88-199-CIV-J-16,
(83-131-CR-J-16

LARRY D. BARNETTE,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(May 17, 1993)

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and BRIGHT*. Senior Circuit Judge.

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*Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM:

We have carefully considered each of the arguments petitioner Barnette advances in support of his application for collateral relief under 28 U.S.C. Section 2255, and conclude that none has merit. Petitioner questions whether the district court had subject matter jurisdiction over his person. The court obviously had subject matter jurisdiction because the indictment charged the violation of criminal statutes of the United States. See 18 U.S.C. Section 3231. (The district court also constituted the proper venue.) Petitioner waived his claim that the court lacked jurisdiction over his person by not presenting the claim to the district court prior to trial. See Fed.

R. Crim. P. 12(b), (f).

Petitioner's argument that various treaties, and agreements implementing them, entered into by the United States somehow ousted the district court of its jurisdiction to try the offenses charged in petitioner's indictment is frivolous on its face and accordingly requires no discussion.

The judgment of the district court denying petitioner section 2255 relief is, therefore,

AFFIRMED.

Supreme Court, U.S.
FILED
AUG 13 1993
OFFICE OF THE CLERK

93-316

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY D. BARNETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Larry D. Barnette, pro se
1500 Holly Avenue
Merritt Island, FL 32952
(407) 453-3545

For Petitioner

August 20, 1993

INDEX:

Order of District Court adopting the Report and Recommendation of the Magistrate dated April 6, 1990 . . A-1

Report and Recommendation of the Magistrate dated Dec. 29, 1993 . . B-1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

LARRY D. BARNETTE,

Petitioner,

v. Case No. 83-131-Cr-J-16
88-199-Civ-J-16

UNITED STATES OF AMERICA,

Respondent.

ORDER

The above-styled cause is before the Court on the Report and Recommendation of the United States Magistrate, filed December 29, 1989. Respondent objected to said Report and Recommendation on January 11, 1990, while Petitioner objected to said Report and Recommendation on January 16, 1990, and responded to the government's objections on January 22, 1990.

After conducting a *de novo* of the entire record herein, the Court hereby adopts, confirms and ratifies the Report and Recommendation.

Accordingly, it is now

ORDERED AND ADJUDGED:

That Petitioner LARRY D. BARNETTE'S Motion made under 28 U.S.C. Section 2255, filed on March 3, 1988, be and the same is hereby DENIED, and the above-styled cause be and the same is hereby DISMISSED.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 6 day of April, 1990.

/s/ John H. Moore, II
UNITED STATES DISTRICT JUDGE

Copies to:

U.S. Attorney (Fallgatter)

Charles W. Arnold, Jr., Esquire

Larry D. Barnette
2721 Park Street
Jacksonville, FL 32204

Civil Section

U.S. Magistrate (Snyder)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

LARRY D. BARNETTE,

Petitioner,

vs. CASE NO. 83-131-Cr-J-16
88-199-Civ-J-16

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION[1]

Petitioner Larry D. Barnette filed a Motion Under 28 U.S.C. Section 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody on March 3,

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[1] Objections may be filed in accordance with 28 U.S.C. Section 636, and Rule 6.02, Local Rules, Middle District of Florida, within ten (10) days after service of this document. Failure to do so shall bar the party from a de no determination by a district judge and from attack factual findings on appeal.

BEST AVAILABLE COPY

1988 (herein First Motion).[2] On August 30, 1983, a federal grand jury returned a twenty-five count Indictment against Petitioner and others.[3] After a three-month jury trial before the Honorable Susan H. Black in the United States District Court for the Middle District of Florida, Petitioner was convicted and sentenced on various counts. On October 8, 1986, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the District Court,

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[2] Petitioner has also filed pro se a second Motion Under 28 U.S.C. Section 2255 Requesting a Retrial Under the Authority Outlined in 28 U.S.C. Section 455 on October 3, 1988 (Second Motion). The issue raised in the Second Motion are addressed a Report and Recommendation entered contemporaneously with this Report and Recommendation.

[3] The facts are outlined by the United States Court of Appeals, Eleventh Circuit in United States v. Barnette, 800 F.2d 1558 (11th Cir. 1986) (per curiam).

excluding a restitution order imposed as part of the sentence. United States v. Barnette, 800 F.2d 1558, 1560 (11th Cir. 1986) (per curiam). Petitioner sought reviewed by certiorari in the United States Supreme Court, which was denied on March 23, 1987. United States v. Barnette, 480 U.S. 935 (1987).

First Motion

In his First Motion, Petitioner alleges the United States District Court wherein he was tried was without jurisdiction. It is Petitioner's view that a treaty, to which the United States and West Germany are signatories, divested the United States District Court of jurisdiction over the crimes with which he was charged. Petitioner contends that, according to the terms of the treaty,

> when an offense is committed in West Germany by a member of the American armed forces or a member of the "civilian component" of the American Armed Forces and the offense is punishable in West Germany, West Germany has primary jurisdiction to try the offender. This primary jurisdiction strips the United States of jurisdiction unless and until the United States requests, and West Germany grants, a waiver of jurisdiction.

Memorandum of Law in Support of Defendant's Motion Under 28 U.S.C. Section 2255, filed March 3, 1988 (hereinafter First Memorandum) at 3.

The treaty upon which Petitioner relies, the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces (hereinafter NATO/SOFA)[4], was signed by the United States and others on June 19, 1951. Following ratification by the Senate and

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[4] 4 U.S.T. 1792, T.I.A.S. No. 2864.

the President, the treaty went into force on August 23, 1953. See Plaster v. United States, 720 F.2d 340, 342 (4th Cir. 1984); see also Matter of Burt, 737 F.2d 1477, 1478 (7th Cir. 1984). On August 3, 1959, the United States and West Germany signed a Supplementary Agreement to NATO/SOFA[5], which went into force on July 1, 1963. Plaster, 720 F.2d at 343. Petitioner claims he and the crimes with which he was charged fall within the scope of the treaty because he was a "member of the 'civilian component' and the offenses were 'committed within the territory of the receiving State [West Germany] and punishable by the law of that State.'" First Memorandum at 3.

According to the express language of

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[5] 14 U.S.T. 531, T.I.A.S. No. 5351.

the treaty, the jurisdictional provisions set forth in Article VII of NATO/SOFA potentially apply to three categories of individuals: "members of a force or civilian component and their dependents . . . ." 4 U.S.T. 1792, 1798, T.I.A.S. No. 2846 (emphasis added). Article I, 1(a) of NATO/SOFA defines "force" as "the personnel belonging to the . . . armed services of one Contracting Party when in the territory of another Contracting Party . . . in connection with their official duties . . . ." and "civilian component" is defined in Article I, 1(b) as

> the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in

which the force is located . . . .

4 U.S.T. 1792, 1794, T.I.A.S. No. 2846, art. I, paras. 1(a) and 1(b) (emphasis added).[6] The Supplemental Agreement also makes reference to the definition of civilian component contained in Article I, 1(b) of NATO/SOFA. Article 73 of the Supplementary Agreement provides:

> Technical experts whose services are required by a force and who in Federal territory exclusively serve that force either in an advisory capacity in technical matters or for the setting up, operation or maintenance of equipment shall be considered to be, and treated as, members of the civilian component. . . .

14 U.S.T. 531, 623, T.I.A.S. No. 5351.

An evidentiary hearing was held in

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[6] "'[D]ependent' means the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support ...." 4 U.S.T. 1792, 1794 T.I.A.S. No. 2846, art. I, para. 1(c).

connection with Petitioner's First Motion on December 4 and 5, 1989. In an effort to establish his alleged civilian component status, Petitioner called as an expert in the field of military law, Mr. Jan Horbaly. See Volume 1 of Transcript of Hearing on Petitioner's Motion for Writ of Habeas Corpus, filed December 19, 1989 (hereinafter Vol. 1), at 17-23. Mr. Horbaly testified that, based upon his review of the stamp which was placed in the Petitioner's passport and the laundry services contract with the United States Army, Petitioner was a "technical expert" within the meaning of Article 73 of the Supplementary Agreement and thus, a member of the civilian component. Vol. 1

at 36-39, 50-51.[7]

Lieutenant Colonel H. Wayne Elliott of the United States Army testified as an expert in the field of military law and in the interpretation of the Status of Forces Agreements, and specifically, NATO/SOFA. See Vol. 1 at 175-86. To determine whether Petitioner was a member of the civilian component, Lt. Col. Elliott indicated it would be necessary to examine the definitional provisions set forth in Article I of NATO/SOFA. According to Lt. Col. Elliott, Petitioner

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[7] In passing, the Court would note Petitioner initially alleged, prior to the evidentiary hearing, that he was a member of the civilian component as that term is defined in Article I, 1(b) of NATO/SOFA. First Memorandum at 10-11. However, on cross-examination by the United States, Mr. Horbaly stated Petitioner was not a member of the civilian component" [i]n a strict reading of the literal language...[of Article I, 1(b) of NATO/SOFA.]" Vol. 1 at 49.

does not fall within the definition of civilian component under Article I, 1(b), of NATO/SOFA because he was not "in the employ of an armed service." Vol. 1 at 187 (emphasis added). He explained, "[t]he people who are contemplated by this provision, Article I, 1(b),are Department of the Army civilians or Department of the Air Force civilians. An indication, in fact, [also] relevant to this particular interpretation is the Korean SOFA and the Japanese SOFA mentions contractors, but the NATO-SOFA does not." Id. Having concluded Petitioner was not a member of the civilian component under the definitional provisions of NATO/SOFA, Lt. Col. Elliott further explained that "Article 73 [of the supplementary Agreement] does not make a contractor a member of the

civilian component. . . ." Vol. 1 at 188. He explained Article 73 pertains only to logistic support which

> are those items provided by the U.S. forces to our employees or military members. Normally there are tax consequences to them. It's the ability to use the PX, the ability to use the Commissary, the ability to buy tax free gasoline, to register your car with the U.S. forces versus Germany. These are the items of logistic support that have been listed, I believe, in the letter of accreditation in this case, and we take those from the regulation and we list them in the accreditation letter.

Vol. 1 at 203. He explained that even the placement of Article 73 supports his conclusion that it does not pertain to the criminal aspects of NATO/SOFA.

> Article 73 . . . comes right after two other articles which deal with the economic issues. Article 71 which deals with non-German, noncommercial organizations, the Red Cross, the Boy Scouts, and their immunity; and the immunity of their employees from German taxation; 72 deals with non-German commercial

enterprises, those are the banks that service the U.S. Forces.

73 provides for one other group of service providers that the U.S. Forces have -- and when I say U.S. remember it's all the sending states, but for us we're talking the U.S.-Germany relationships -- that the other services might need, and that was technical experts who, when this was written, might not be readily available on the economy of Germany. So we expected that we would have to bring to Germany from the U.S. contractors who were not in our employ, but could provide a technical service to us.

Vol. 1 at 202.

While Petitioner asserts his letters of accreditation, see Petitioner's Exhibits 5-7, support his contention that he is a member of the civilian component by virtue of Article 73, Lt. Col. Elliott explained that Reg. 600-700, which is referenced in Petitioner's letter of accreditation,

pertains to logistic support that's authorized, and . . . each of these

> items . . . has monetary value so that when a contractor is declared to be a technical expert normally as a part of that value of the contract, or the price paid by the U.S. forces to the contractor is reduced by the value of each of these items, the military banking facilities, credit unions, recreation services, pet and firearm registration, and the SOFA stamp and the Customs exemption. Each of these things is reduced from the overall contract, so it saves the U.S. Government money.

Vol. 1 at 205-06. Lt. Col Elliott noted, however, that "[a]nother Appendix to that registration governs members of the civilian component who are in the employ of the U.S. Forces, and obviously their compensation is not reduced because they get these privileges." Vol. 1 at 206. Petitioner, as a contractor, would not fall into the latter category as he was not in the employ of the U.S. forces.

Likewise, although both Petitioner and Mr. Horbaly assert the stamp in the

Petitioner's passport support the contention Petitioner is a member of the civilian component, Lt. Col. Elliott's testimony also refutes this allegation. He explained that although Article III, paragraph 3, provides that "members of the civilian component and dependents shall be so described in their passport[s] . . . , if you look at Article III of the basic SOFA, that only deals with immigration, entry into and exit from a receiving state." Vol. 1 at 208. He further elaborated:

> Our direct employees, Department of the Army civilians and our dependents get passports with that stamp in them; also, by virtue of Article 73, contractors in Germany can get the stamp.
>
> In fact, if you look at USAREUR Reg. 600-700, one of the things that it says was that the privilege card which goes along with the passport, the privilege card which you need in order to make all these tax free

> purchases, will be overstamped "Not Valid In Belgium." The reason for that is that this Article 73 doesn't apply in Belgium. In Belgium you're left with the basic NATO/SOFA which does not provide any SOFA status to contractors.
>
> So the stamp is evidence of having SOFA status, it does not mean that you're actually a member of the civilian component.

Vol. 1 at 207; see also S. Lazareff, Status Of Military Forces Under Current Intentional Law 91 (1971).

Mr. Paul J. Conderman, who testified as an expert in the field of military law, German penal law, and the application of the criminal jurisdictional provisions of NATO/SOFA, see Vol. 1 at 246-69, was also of the view that NATO/SOFA was inapplicable to this case. He outlined in detail the basis for his opinion.

As noted previously, Petitioner

argues he and the crimes with which he was charged fall within the scope of the treaty because he was a "member of the 'civilian component' and the offenses were 'committed within the territory of the receiving State [West Germany] and punishable by the law of that State.'" First Memorandum at 3. On the basis of the testimony presented at the evidentiary hearing, the pleadings herein, and the rationale for the opinions expressed by Mr. Horbaly, Lt. Col. Elliott, and Mr. Conderman, the Court credits the testimony of Lt. Col. Elliott and Mr. Conderman and finds Petitioner was not a member of the civilian component. As such, Petitioner's reliance on NATO/SOFA is unfounded. In view of the Court's finding that Petitioner was not a member of the

civilian component, there is no necessity for the Court to address whether the "offenses were committed within the territory of the receiving-State [West Germany] and punishable by the law of that State.'" Id.

Alternatively, even if the Petitioner had established he was a member of the civilian component, he would not be subject to the criminal jurisdictional framework outlined in Article VII of the NATO/SOFA in light of Reid v. Covert, 354 U.S. 1 (1957), and its progeny. See Vol. 1 at 59-64, 200, 209-210; see also Volume 2 of Transcript of Hearing on Petitioner's Motion for Writ of Habeas Corpus, filed December 19,

1989, at 14-15.[8]

Recommendation

Accordingly, it is recommended Petitioner's First Motion be denied.

ENTERED at Jacksonville, Florida, this 29th day of December, 1989.

/s/ Howard T. Snyder
Howard T. Snyder
United States Magistrate

Copies to:

The Honorable John H. Moore, II
United States District Judge

Charles L. Truncale, Esquire
Assistant United States Attorney
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[8] The Court elected to resolve Petitioner's First Motion on the bases discussed herein and does not reach the merits of the argument Petitioner lacks standing to complain of a treaty violation. See Vol. 1 at 201.

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